U.S. Department of Labor

Board of Alien Labor Certification Appeals
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Issue Date: 30 October 2009

BALCA No.: **2009-PER-00151**
ETA No.: C-07226-65940

In the Matter of:

YOUR EMPLOYMENT SERVICE INC.,
d/b/a
THE HUGHES AGENCY,
Employer,

on behalf of

PATRICIA MENDEZ ALVAREZ,
Alien.

Certifying Officer: Dominic Pavese
Chicago Processing Center

Appearances: Tom Travis, Esquire
Little Rock, Arkansas
For the Employer

Gary M. Buff, Associate Solicitor
Frank P. Buckley, Attorney
Office of the Solicitor
Division of Employment and Training Legal Services
Washington, D.C.
For the Certifying Officer

Before: **Chapman, Colwell and Johnson**
Administrative Law Judges

DECISION AND ORDER

PER CURIAM. This case arises under Section 212(a)(5)(A) of the Immigration and Nationality Act, 8 U.S.C. §1182(a)(5)(A), and the "PERM" regulations found at Title 20, Part 656 of the Code of Federal Regulations.

STATEMENT OF THE CASE

On August 13, 2007, the Certifying Officer ("CO") accepted for processing the Employer's application for permanent alien labor certification for the position of "Human Resource Coordinator." (AF 22-41). The Employer stated no educational or training requirements, but required 24 months of experience in the job offered. (AF 24). The job duties were described as "Compile and keep personnel records. Job duties are as described for 43-4161.00 – Human Resources Assistants, Except Payroll and Timekeeping." (AF 34, Form 9089, Section H-11).[1]

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[1] The O*Net describes the tasks for a Occupational Code No. 43-4161.00 as:

- Explain company personnel policies, benefits, and procedures to employees or job applicants.
- Process, verify, and maintain documentation relating to personnel activities such as staffing, recruitment, training, grievances, performance evaluations, and classifications.
- Record data for each employee, including such information as addresses, weekly earnings, absences, amount of sales or production, supervisory reports on performance, and dates of and reasons for terminations.
- Process and review employment applications to evaluate qualifications or eligibility of applicants.
- Answer questions regarding examinations, eligibility, salaries, benefits, and other pertinent information.
- Examine employee files to answer inquiries and provide information for personnel actions.
- Gather personnel records from other departments or employees.
- Search employee files to obtain information for authorized persons and organizations, such as credit bureaus and finance companies.
- Interview job applicants to obtain and verify information used to screen and evaluate them.

In the portion of the application where the Alien's qualifications are described, the Employer indicated that the Alien had the required experience (AF 27, Form 9089, Section J-18), and did not gain that experience with the Employer in a position substantially comparable to the position for which labor certification was requested. (AF 27, Form 9089, Section J-21). The Alien was currently employed by the Employer. (AF, Form 9089, Section J-23). In the portion of the application in which the Alien's work experience is detailed, the only employment listed is with the Employer as a "Human Resources Coordinator" from April 1, 2000 to August 14, 2007. (AF 27, Form 9089, Section K-a). The job duties of this employment were described as follows:

> Compile and keep personnel records. Job duties are as described for 43-4161.00 – Human Resources Assistants, Except Payroll and Timekeeping.
>
> Qualifying experience was gained with the petitioning employer in a position not substantially comparable to the position for which certification is being sought, performing different job duties more than 50% of the time.

(AF 38, Form 9089, Section K-a-9).

On August 30, 2007, the CO issued an Audit Notification letter. (AF 18-21). The letter required the Employer to document that the Alien's qualifying experience was not in a position while working for the Employer in a position substantially comparable to the position for which labor certification was sought. The CO noted that the documentation must show that the job in which qualifying experience was gained did not require performance of the same job duties as the job for which labor certification was sought more than 50 percent of the time, and/or that it is no longer feasible to train a worker to

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- Request information from law enforcement officials, previous employers, and other references to determine applicants' employment acceptability.

qualify for the position. The CO listed as acceptable documentation items such as position descriptions, the percentage of time spent on the various duties, organizational charts, and payroll records.

The Employer provided its audit response in a package dated September 24, 2007, but not received by the CO until October 10, 2007. (AF 9-17). The Employer's Senior Vice President wrote a letter in regard to the Alien's qualifications for the position:

> To Whom It May Concern:
>
> Patricia Mendez-Alvarez started working for our company on or about April 1, 2000.0 [sic] She began as an office assistant helping with filing and answering the phones. She gradually progressed, learning the staffing process and began taking on more and more responsibilities as time went by. She took classes and studied labor law, employment law principles and ethical practices pertaining to the staffing industry. On or about August 5th 2006 she became a Certified Staffing Professional pursuant to the requirements of the American Staffing Association.
>
> Patricia's qualifying experience was gained by her while working for our company in positions not substantially comparable to the position for which certification is being sought. Due to the growth and increased work load of our business it would not be feasible to train a worker to qualify for the position.

(AF 16). The Employer enclosed a copy of the Alien's Certified Staffing Professional certificate from the American Staffing Association. (AF 17). The response also included a prevailing wage request form and a Job Opening Notice on which the job duties of the position for which labor certification was sought were described (AF 13, 14). The Employer did not, however, provide any job descriptions for a position that the Alien may have held that were not substantially comparable to the position for which labor certification was sought. Nor did the Employer submit any organizational charts, payroll records, or other any documentation to support the assertions made in the Vice-President's statement.

On October 12, 2007, the CO issued a letter denying certification under 20 C.F.R. § 656.17(i)(1), finding that the Employer's documentation was insufficient to establish that the Alien did not gain her qualifying experience with the Employer in a substantially similar job, or that it is not now feasible to provide the required training provided to the Alien. (AF 6-8).

By letter dated November 9, 2007, and received by the CO on November 14, 2007, the Employer's attorney filed a request for reconsideration of the denial. (AF 5). Noting that the audit response had included a letter from the Employer attesting that the Alien's experience was in a position not substantially comparable to the position for which labor certification was sought, and that it is not now feasible to train a worker to qualify for the position, the attorney argued that the "[t]he employer is in the best position to know what is needed to perform the current job and knows first-hand the training and/or experience required to proficiently perform the essential functions of the job." The attorney also noted that the Alien had gained the Certified Staffing Professional certification more than six years after she started working for the Employer.

On January 28, 2009, the CO issued a letter of reconsideration finding that the denial had been valid. (AF 1-2) The CO then forwarded an Appeal File to the Board of Alien Labor Certification Appeals ("BALCA" or the Board). On February 9, 2009, the Board issued a Notice of Docketing. The copy of the Notice of Docketing served on the Alien was returned by the United States Postal Service as undeliverable. However, the Employer's attorney filed a Statement of Position in response to the Notice. Accordingly, we will proceed to the merits of the appeal.

The Employer's Statement of Position on appeal relied on the arguments made in the request for reconsideration.

The CO filed a letter brief dated March 26, 2009, and received by the Board on March 31, 2009. The CO's brief notes that the job duties described in the ETA Form 9089 for the position for which labor certification is sought are identical to the job duties describing the Alien's work for the Employer, and that the Employer had not provided any of the kinds of documentation suggested in the definition of "substantially comparable" found in section 656.17(i)(5)(i). The CO noted that the job titles were identical, suggesting that the jobs were the same. The CO cited the pre-PERM decision in *Delitizer Corp. of Newton*, 1988-INA-482 (May 9, 1990) (en banc), for the guidelines used in determining the similarity or dissimilarity of jobs, and other pre-PERM caselaw to the effect that bare assertions by an employer without supporting reasoning or evidence are generally insufficient to carry the employer's burden of proving that jobs are dissimilar or that it is not now feasible to train a worker.

DISCUSSION

Recruitment of U.S. workers is a mandatory element of the certification process. 20 C.F.R. § 656.17(e). As part of the recruitment process, the job requirements, as described, must represent the employer's actual minimum requirements for the job opportunity and the employer must not have hired workers with less training or experience for the job opportunity. 20 C.F.R. § 656.17(i)(1) and (i)(2). The purpose of this requirement is to addresses the situation of an employer requiring more stringent qualifications of a U.S. worker than it requires of the alien; the employer is not allowed to treat the alien more favorably than it would a U.S. worker. *ERF Inc., d/b/a Bayside Motor Inn*, 1989-INA-105 (Feb. 14, 1990) (pre-PERM decision).

The regulation, however, only proscribes hiring workers with less training or experience for jobs "substantially comparable" to the job for which labor certification is sought. *See also Brent-Wood Products, Inc.*, 1988-INA-259 (Feb. 28, 1989) (en banc)

(pre-PERM decision); *Delitizer, supra*. "Substantially comparable" is defined in the PERM regulations as follows:

> A "substantially comparable" job or position means a job or position requiring performance of the same job duties more than 50 percent of the time. This requirement can be documented by furnishing position descriptions, the percentage of time spent on the various duties, organization charts, and payroll records.

20 C.F.R. § 656.17(i)(5)(ii).

In the instant case, the CO's Audit Notification recited the types of documentation listed in the regulation that the Employer needed to provide to establish that the jobs were not substantially comparable. The Employer's audit response, however, failed to provide documentation to support its Vice-President's assertion that the jobs at issue were not substantially comparable. The Board has long held that a bare assertion without either supporting reasoning or evidence is generally insufficient to carry an employer's burden of proof. *See Carlos Uy III,* 1997-INA-304 (Mar. 3, 1999) (en banc). Here, the Employer's statement was clearly inadequate, standing alone, to carry the Employer's burden of proof. It provided neither details explaining why the jobs had different duties, nor documentation to support such an argument. The Employer's argument on appeal essentially boils down to the truism that an employer is in the best position to know whether the jobs were substantially comparable. But the regulation requires the Employer to establish that the job in which the Alien gained her qualifying experience did not require performance of the same job duties as the position for which labor certification is being sought more than 50 percent of time. Merely saying that the jobs were not substantially comparable is not the same as providing documentation to support the assertion.

The regulation at 20 C.F.R. § 656.17(i)(3)(ii) also permits an employer to use an experience requirement that would otherwise violate section 656.17(i) if it "can

demonstrate that it is no longer feasible to train a worker to qualify for the position." The Board has long held that a bare statement of infeasibility to train is inadequate to establish that an employer cannot now hire workers with less experience and provide training. *MMMATS, Inc.*, 1987-INA-540 (Nov. 24, 1987) (*en banc*). Here, the Employer's Vice-President asserted that due to the growth and increased work load it would not be feasible to train a worker to qualify for the position, but he provided no documentation to support that assertion.

The burden of proof to establish eligibility for a labor certification is on the petitioning employer. 8 U.S.C. § 1361; 20 C.F.R. § 656.2(b). In the instant case, we find that the Employer did not meet its burden of establishing either (1) that the Alien did not gain her qualifying experience for the position for which labor certification is being sought in a position with the Employer that was not substantially comparable, or (2) that it is no longer feasible to train a worker to qualify for the position.

ORDER

Based on the foregoing, **IT IS ORDERED** that the Certifying Officer's denial of labor certification in the above-captioned matter is hereby **AFFIRMED**.

Entered at the direction of the panel by:

A

Todd R. Smyth
Secretary to the
Board of Alien Labor Certification Appeals

NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary unless within twenty days from the date of service a party petitions for review by the full Board of Alien Labor Certification Appeals. Such review is not favored and ordinarily will not be granted except (1) when full Board consideration is

necessary to secure or maintain uniformity of Board decisions; or (2) when the proceeding involves a question of exceptional importance. Petitions for review must be filed with:

Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, N.W.
Suite 400 North
Washington, D.C., 20001-8002.

Copies of the petition must also be accompanied by a written statement setting forth the date and manner of that service. The petition must specify the basis for requesting review by the full Board, with supporting authority, if any, and shall not exceed five double-spaced typed pages. Responses, if any, must be filed within ten days of service of the petition, and shall not exceed five double-spaced typewritten pages. Upon the granting of a petition the Board may order briefs.